Supreme Court of the United States.

OCTOBER TERM, 1900.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. EMMA HUMBLE.	No. 177.

Statement.

This action for personal injuries was brought by Emma Humble against The Texas and Pacific Railway Company in May, 1898, in the Circuit Court of Miller County, Arkansas, and was removed to the Circuit Court of the United States for the proper district on the ground that the defendant is a corporation created and organized under the laws of the United States.

At the time the accident, which constitutes plaintiff's cause of action, occurred, and at all other times covered by the record, plaintiff was a married woman, the wife of one J. K. Humble. Her husband was not joined in the action.

In her complaint (Tr., p. 1) plaintiff alleged that on the 9th day of April, 1898, she went to defendant's

station in Texarkana, Miller County, Arkansas, for the purpose of taking a train to Shreveport, Louisiana; that after purchasing her ticket she went to the waiting room to await the arrival of the train and that she sat down on a seat furnished by defendant for the accomodation of waiting passengers; that the bottom of said seat fell through, allowing her body to slip in such a manner that her limbs and head protruded above it, and that in her struggles to release herself she sustained a rupture which is incurable; that said seat was defective and that the defendant knew of the defect; that there was nothing in the appearance of the seat to indicate that it was defective, and that she had no notice that it was defective. She also alleged, by way of damages, that she must always be "debarred from performing her household duties, such as lifting, or she must submit to a surgical operation which will be painful and dangerous," and "that she had been accustomed to do, and had done, all the household work for her family, which consisted of her husband and three children, and her working capacity was of the value of twenty-five dollars per month; but since said injury she has been able to perform only light work, and that the value of her working capacity has been reduced one half." She prayed for $25,000 damages.

It will be observed, and we wish it especially noted, that the complaint does not allege, as we insist it should in order to state a cause of action, for loss of earning capacity, that the wife was at the time of the injury engaged in any business or service in which she would, but for the personal injury for which this action is brought, have earned something for her *separate benefit* which she has

lost by reason of the injury for which this action is brought. Such facts are essential to any right of the wife under the statute of Arkansas relied on by she plaintiff to support the action, in order to give the wife a right of action in her own name for damages for loss or diminution of earning capacity.

The defendant by its answer (Tr., p. 7) alleged that plaintiff "was at the time of the alleged injury, and is now, a married women," and denied that she "received any injuries to her person by reason of one of the seats in said waiting-room breaking with her."

Some days before the trial defendant made a motion (Tr., p. 9) that plaintiff be compelled to make her husband a party plaintiff on the ground that if she could recover for her injury her husband could also recover upon the same proof.

On the hearing of said motion, November 17, 1898, it was admitted that J. K. Humble was the husband of the plaintiff at the time she received the injury, and at the time of the hearing; and that he lived, and still lives, in Shreveport, Louisiana, as his home. The motion was overruled and defendant excepted (Tr., p. 9).

Plaintiff introduced evidence tending to prove the allegations of her complaint. She herself testified that for the past few years her means of livelihood had been keeping a boarding house and hotel at Pine Bluff, and that the business was run in her name and was her own (Tr., p. 12); that she left Pine Bluff, going to Texarkana, about October, 1897 (Tr., p. 14); that she gave up the hotel business three or four days, "or something like that," before she left Pine Bluff (Tr., p. 15); that in Texarkana she had been boarding at different places until the time of the accident (Tr., p. 14), and that while there she did not have any oc-

cupation, and she was not carrying on any trade or business on her own account at the time of the accident (Tr., pp. 14, 15). To this testimony, and that of other witnesses tending to prove plaintiff's capacity to earn money by her labor, defendant objected. The objections were overruled and exceptions taken (Tr., pp. 12, 32).

The defendant introduced evidence contradicting plaintiff's witnesses as to the condition of the seat and as to the injuries sustained by plaintiff.

There was a verdict in favor of the plaintiff for $9,000, and judgment for that sum and costs was duly entered. This judgment included damages for diminution of the wife's earning capacity extending throughout her life (see *infra*, pp. 30–32).

On writ of error to the United States Circuit Court of Appeals for the Eighth Circuit the judgment was affirmed by a majority of the court, SANBORN, J., dissenting (Tr., pp. 45 and 49).

The case is now here for review on writ of error from the judgment of affirmance.

Assignment of errors.

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas, and in holding that said court committed no error in overruling the motion made by plaintiff in error before the trial began to

compel defendant in error, a married woman, to make her husband, J. K. Humble, a party plaintiff, so that all matters and the rights of both defendant in error and her husband could be tried at once.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in overruling the motion made by plaintiff in error to continue the cause for want of the testimony of Mrs. Virginia Skipwith, because it was shown to the court on said application that her evidence was material to plaintiff in error's defense, and that she had been regularly subpœnaed and was sick and unable to attend, and she lived within a mile of where the case was being tried, and the admission of defendant in error that the witness would swear as alleged was no answer to the motion.

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in allowing the following evidence to go the jury. Mrs. Humble testified:

"My means of livlihood for the last few years has been the keeping of a hotel; this was last year, just before I came to Texarkana. It was run by me as my sole and separate business. I superintended the work and worked when we were short of help."

Drs. Gray and Ford testified that Mrs. Humble's capacity to labor was diminished one-third or more.

This evidence was not admissible, because the defendant in error was a married woman and the recovery for those damages belonged to her husband and could not be recovered by the wife suing alone.

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said

court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"In this case the plaintiff cannot recover, because the evidence shows that the acts of some malicious boys, for whose acts the defendant is not liable, caused the plaintiff to sit in a seat that had not been prepared for her, nor for other passengers, and thereby she received the injury she did."

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"The plaintiff cannot recover any damages because of her capacity to labor being lessened, because she has not proved her ability to labor was of any value at and before the time she was injured."

VII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because there is no evidence showing any capacity to labor and earn money at the time and just before she was injured."

VIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing special charge asked by plaintiff in error which is as follows:

"In this case the plaintiff being a married woman, and her husband not joining in the suit, she cannot recover any damages on account of her diminished capacity to labor and earn money."

IX.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"If you believe that the seat in question was out of order by reason of the perforated bottom being out or hanging down, and that its condition was apparent to any person about to sit down in it, and you further believe that some boys not in the employ of the defendant and without defendant's knowledge or consent went, a short time before the accident, and fixed the perforated bottom into the frame of the seat so that it would appear to be in good condition, and this was done for the purpose of deceiving persons and making them believe the seat was in good condition and the plaintiff was deceived by its then appearance and induced to sit in the seat by reason of being thus deceived, then defendant would not be liable."

X.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"The plaintiff being a married woman and her husband not having joined her in this suit and she and her husband having their present and prospective home in the State of Louisiana, then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in the future has been lessened by the injury, and by the laws of that State she cannot recover such damages. You will, therefore, allow nothing as damages for any diminished capacity to labor and earn money."

XI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Plaintiff cannot recover anything on account of her diminished capacity to labor because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession, or occupation, and her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery."

XII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in charging the jury as follows:

"If you find for plaintiff, in assessing her damages, you will take into consideration her age and earning capacity before and after the injury was received, as shown by the proof."

This error was because it allows the plaintiff in error, who is a married woman, to recover damages on account of her capacity to labor and earn money being diminished, when her husband, J. K. Humble, is not a party, and said damages cannot be recovered by the wife, and because it appeared at the time of the injury and at the time of the trial the defendant in error and her husband had made the State of Louisiana their home for the future, and in that State the husband and not the wife can recover the damages by reason of the wife's diminished capacity to labor and earn money.

BRIEF.

The following facts clearly appear from the record:

1. That the accident to the plaintiff, Emma Humble, occurred in Arkansas, and that at that time she was and still is the wife of J. K. Humble, whose domicile then was and still is in Shreveport, Louisiana:

2. Under the laws of Louisiana, damages for injuries to the wife from negligence are community property for which the right of action is solely in the husband. The statutes of Louisiana on the subject are as follows:

"ART. 2399. Every marriage contract in this State superinduces of right partnership or community of acquits or gains, if there be no stipulation to the contrary.

"ART. 2400. All property acquired in this State by non-resident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which regulate the community of acquits and gains between citizens of this State.

"ART. 2401. A marriage contracted out of this State between persons who afterwards come here to live is also subject to community of acquits, with respect to such as is acquired after their arrival.

"ART. 2402. This partnership or community consists of the profits of all the effects of which the husband has the administration, and enjoyment either of right or in fact of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase or in any other similar way, even although the purchase be only in the name of one of the two, and not of both, because in that case the period of time when the purchase is made is alone attended to and not the person who made the purchase.

"ART. 2404. The husband is the head and master of the partnership or community of gains, he administers its effects, disposes of the revenue which they produce, and may alienate them by an owner's title without the consent and permission of his wife."

3. In Arkansas a wife may sue alone for damages for injuries to her person caused by negligence, but the statute does not authorize the wife to recover for loss of earning capacity when she is not engaged in any separate trade, labor or business on her own account. The laws of Arkansas on this subject are as follows:

"SEC. 5641. Where a married woman is a party her husband must be joined with her except in the following cases:

"1st. She may be sued alone upon contracts made by her in respect to her sole and separate property or in respect to any trade or business carried on by her under any statute of this State.

"2nd. She may maintain an action in her own name for or on account of her sole or separate estate or property or for damages, against any person or body corporate for any injury to her person, character or property.

"SEC. 4946. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this State on account of the said property, business or services."

These and other sections of the Arkansas Statutes relating to married women are reprinted in this brief *(infra,* 18, 19*)*.

4. At the proper time defendant moved that the husband of the plaintiff be made a party plaintiff, because

he could also recover damages upon the same proofs. The motion was overruled and exception taken (Tr., p. 9). The same point was secured by assignment of error No. II.

5. Exception was saved to the action of the trial court in admitting evidence tending to show that plaintiff's capacity to labor or earn money had been lessened, because :

(a) She had not proved that her ability to labor was of any value at the time she was injured (Assignments of Error, Nos. VI. and VII.).

(b) Because she was a married woman suing alone and without her husband joining in the suit (Assignment of Error No. VIII.).

(c) Because her husband was not joined in the suit and was domiciled in Louisiana, in which State the wife cannot recover damages for the injuries complained of (Assignments of Error Nos. X. and XII.).

(d) Because there is no pleading or evidence that plaintiff was engaged in business on her own account, and her lessened capacity to perform household duties cannot be a basis for recovery by her (Assignments of Error No. XI.).

6. Exception was duly taken to the charge to the jury that the plaintiff could recover for diminished capacity to earn money (Tr., p. 35) ; and to the refusal of the Court to charge as requested by the defendant, the converse of that proposition (Tr., pp. 32–34).

An important question in this case is as to whether the right of action is governed by the law of the plaintiff's domicil ; to-wit, Louisiana, or whether the right to sue

and maintain the action is governed by the laws of Arkansas, where the accident occurred. Whether it is the one or the other we shall endeavor to show that the judgment below, and the views of the Circuit Court of Appeals supporting it are erroneous, and that the judgment should be reversed.

I.

Plaintiff being a married woman, her domicil was in Shreveport, in the state of Louisiana, where her husband resided, and the laws of that state control the marital rights of the wife; and by the laws of that state compensation for personal injuries to a married woman belongs to her husband and he alone can sue therefor.

The laws of the state of Louisiana on the subject matter of this proposition, to-wit, Articles 2399-2404 of the statutes of that state, are quoted *supra* (p. 9). It is admitted in the record (p. 9) that at the date of the injury, as well as at the time of the trial, "plaintiff was a married woman, and that J. K. Humble was her husband both now and at the date she was injured, and that her husband then lived and now lives in Shreveport, La., as his home." It furthermore appeared from her own testimony (Tr., p. 15), that her husband lived at Shreveport, and that she went there for the purpose of making that her home. Under these circumstances the domicil of the husband became that of the wife (*State vs. Barrow, 14 Texas, 183; Anderson vs. Watt, 138 U. S., 694, 706; Nichols*

vs. Nichols, 92 Fed. Rep., 1; Story's Conflict of Laws, Sec. 136; Schouler on Domestic Relations, Sec. 38; Cord on Legal and Equitable Rights of Married Woman, Sec. 1116).

It is distinctly held under Articles 2399-2404, *supra*, of the Code of Louisiana, by the Supreme Court of that state that compensation for an injury to a married woman belongs to her husband *(Ford vs. Brooks, 35 La. Ann., 157; White and husband vs. Railway, 42 La. Ann., 990).* This matter is of great importance, because if the law of Louisiana applies to the rights of the husband the present judgment for $9,000 in favor of the wife is no protection to the defendant in Louisiana or even in Arkansas against another action brought by the husband for the same injury.

The supreme test is this: suppose that J. K. Humble, the husband, should sue the Texas & Pacific Ry. Co. in the State of Louisiana, based on the same injury, *per quod servitum amisit*, and the railway company should plead the judgment in this case as a former recovery, the husband would reply that he was not a party to the suit in which this pleaded judgment was rendered, then would the former recovery be a bar to a husband's suit? Now, it cannot be answered that the defendant has no concern in the matter as to whether the recovery goes to the husband or to the wife. That might be so answered, and could be successfully answered if the husband had been a party to and bound by the first judgment.

The husband and wife removed to the State of Louisiana, hence their future acquisitions were controlled by the laws of that State. This right to sue for damages was a right acquired after the domicil was fixed in Louisiana, and the law of that State gave it to

the husband *(White vs. Railroad, 42 La. An., 990)*. So a plea that the wife had recovered on the same cause of action in a suit to which the husband was not a party would be no defense to the suit by the husband, and if this judgment stands, the Railway Company will be put in jeopardy of having to pay twice for the same cause of action.

The statute of Texas provided that all property acquired by a husband or wife during the marriage shall be community property, except any acquired by gift, devise, or descent (Revised Statute of Texas, 2968). Under this statute the Supreme Court of Texas has held in the case of *Ezell vs. Dodson, 60 Tex., 331*, that damages recovered for injury to the wife is community property, and must be sued for and recovered by the husband. That case further holds : " The right to sue for damages for a tort is a chose in action, and property within the legal sense of that term." Citing, 2d Bishop on Married Women, Sec. 271 *(C. B. & Q. R. R. vs. Dunn, 52 Ill., 260)*. To the same effect is the case of *Hawkins vs. Front Street Ry., 3 Wash. St., 592)*.

We therefore insist that, inasmuch as the action in this case, to wit, a common law action for negligence, is transitory, and the right of recovery is given by the statute of Louisiana exclusively to the husband, any action brought to enforce this right must necessarily be in the name of the husband and cannot be maintained by the wife, and for this reason the court erred in overruling the defendant's objection to the evidence offered by the plaintiff, as shown in the Record on page 12, and in refusing the various requests to charge as asked by the defendant (Tr., pp. 32-34) and in charging the jury in plaintiff's favor (Tr., pp. 34, 35).

If, however, the laws of Louisiana do not govern the right of the parties to this action, but the laws of Arkansas govern as to the right as well as to the remedy, we then insist, for the reasons to be hereafter stated in this brief, that—

II.

Damages for the impairment of a wife's capacity to earn money, she not being in business on her own account, and damages for the impairment of her ability to serve in the household belong to her husband and not to her.

The admission of evidence and the charge of the Court as to the impairment of her capacity to earn money and to perform her household duties were clearly error.

Inasmuch as the statute of Arkansas on the subject of married women, relating to this action, adopted *April 28, 1873*, is a transcript of the legislation of New York of 1860 and 1862, which had been authoritatively construed by the Court of Appeals of New York, prior to its adoption by the State of Arkansas, it is presumed, according to the settled rule that, in re-enacting the statute, there was also re-enacted with it the construction which had then been put upon it by the Courts of the state from which it was adopted, if there is nothing to show a contrary intent.

In her complaint Mrs. Humble alleged, as the ground for asking damages, the following (Tr., p. 3) :

" Plaintiff alleges that said last-named injury is permanent, has been and always will be painful, and that she must always wear a truss or some similar appliance and be debarred from performing many of her household duties, such as lifting, or she must submit to a surgical operation which will be painful and dangerous.

" Plaintiff was, at the date of her injuries as aforesaid, thirty-six years of age, and her expectancy of life was thirty years ; that she had been accustomed to do and had done all the household work for her family, which consisted of her husband and three children, and her working capacity was of the value of twenty-five dollars per month ; but since said injury she has been able to perform only light work, and that the value of her working capacity has been reduced one-half.

" Plaintift alleges that, by reason of the negligence of the defendant in failing to provide and maintain said seat in a reasonably safe condition, she has been humiliated and damaged, as before stated, in the sum of twenty-five thousand dollars."

The Court will note that plaintiff did not allege in her complaint that she was at the time of the accident, or had previously been, engaged in any business or occupation on her own account, and that she makes no claim for damages by reason of the impairment of her ability to do business or to work on her own account, but claims damages only *because her capacity to perform her household duties* was lessened. Plaintiff had not been in business for herself for several months before the accident.

As the trial Court charged the jury that they could not find damages for plaintiff's humiliation at the time of the accident (Tr., p. 35), it is to be assumed that the verdict did not include such damages, but was for the

impairment of her ability to perform household duties only.

We submit and insist that under the statute of Arkansas (quoted *infra*,) the wife unless she is actually engaged in some business or service in which she would, but for the personal injury for which she seeks compensation, have earned something for her separate benefit, and which she has lost by reason of the injury she has sustained, cannot recover damages for an impairment of her capacity to labor or to perform her household duties, for such damages do not belong to her, but to her husband, who has suffered the loss.

In a proper action, namely, where she is actually engaged at the time of the alleged wrongful act in some business or service in which she would, but for that act, have earned something for her separate benefit, she may recover for her own loss resulting from her own incapacity to continue in business on her own account, a right conferred upon her by the statutes known as the "Married Women's Acts;" but she cannot recover damages for the loss or impairment of her mere capacity to labor, or of her ability to *serve in the household*, the right to which has been vested in the husband from time immemorial, and has not been divested or taken away by the married women's acts of Arkansas, or by any other legislation of the State.

These propositions have been announced and upheld in the State of New York, construing statutes from which the laws of Arkansas on this subject were copied almost *verbatim*.

For convenient comparison we place these statutes in parallel columns:

Arkansas Statute.	New York Statute.
Adopted April 28, 1873.	*Laws of 1860, Chapter 90.*
Digest Statutes of Arkansas. Sandel & Hill. 1894.	
Sec. 4945. The property, both real and personal, which any married woman now owns as her sole and separate propety; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account; that which a woman married in this state owns at the time of her marriage, and the rents, issues and proceeds of all such property shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent.	Sec. 1. The property, both real and personal, which any married woman now owns, as her sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account; that which a woman married in this state owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her as his agent.
"Sec. 4946. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and	Sec. 2. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any

perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this State on account of the said property, business or services."

"SEC. 5641. Where a married woman is a party her husband must be joined with her except in the following cases:

"1st. She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this State.

"2nd. She may *maintain an action in her own name* for or on account of her sole or separate estate or property, or *for damages against any person or body corporate for any injury to her person, character* or property."

labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name.

SEC. 7. Any married woman may, while married, sue and be sued in all matters having relation to her property, which may be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or the gift of any person except her husband, in the same manner as if she were sole. And any married woman may bring and *maintain an action in her own name for damages against any person or body corporate for any injury to her person or character* the same as if she were sole; and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property.

[The Amendatory Act of 1862 re-enacted the above *verbatim* and only added a clause relating to bonds or undertakings by married women in suits by or against them.]

The purpose of Section 5,641 of the Arkansas statute above quoted, and that of the corresponding section (7) of the New York statute is very plain when we consider the common law rule, and the change which the statute was intended to effect. The common law rule in cases as to parties plaintiff in actions for negligence at common law is stated in Reeve on Domestic Relations, quoted in this brief *infra*, page 36. It is also stated as follows by Thompson on Negligence (Vol. 2, p. 1240, Section 15):

"Two separate causes of action may arise at common law from the same injuries inflicted upon the person of the wife during coverture; one in the name of both husband and wife, for her own injuries; the other in the name of the husband, for the damages sustained by him in the loss of her services and society—*per quod consortium amisit*. Although these causes of action originate in the same injuries, the damages to be recovered are entirely separate and distinct. Where the husband and wife are joined, he is but the nominal plaintiff, the injury to the wife being the meritorious cause of action, and the measure of damages is the injury she has herself sustained. In such an action nothing can be recovered for the loss of her services to her husband, or for the expense of her cure. Where the husband sues alone to recover for injuries inflicted upon his wife, the action is based upon the damages sustained by him in the loss of her services, the expense attendant upon her cure, and other incidental expenses."

Inasmuch as, for an injury to the person of a married woman, she had the meritorious cause of action, the statutes above mentioned intended to dispense with the necessity of making the husband a party plaintiff; but as the husband is still the head of the family, bound for its support, and is entitled her services in the household, and in all cases where she does not carry on trade or business, or perform any labor or service on her sole and separate account, the right

to her services is still his, and he is still entitled to sue for the loss thereof; and this right was not intended to be affected by the New York or Arkansas statutes. In other words, the legislation above quoted, relating to the wife's right to sue in her own name, was not intended to affect, and does not affect, the right of the husband to recover for consequential damages for loss of services in any other cases than those in which, by these statutes, she is entitled solely to sue. Such is the correct and settled construction of the New York statute, and was such at the time of its re-enactment in Arkansas, as we now proceed to show.

It will be perceived that these statutes do not make a married woman wholly discovert. They recognize the status of coverture and the general rights of the husband, and then make in favor of the wife certain specified exceptions, but among these exceptions is not the right to recover in her own name for diminished capacity to perform household labor. This is a right which still belongs to the husband, for the husband is still bound to support his wife and is still the head of the family.

The leading case construing the New York statutes above quoted is that of *Filer vs. New York Central R. R. Co.*, 49 N. Y., 47, (1872). The facts, as stated by the court, are these: The plaintiff, a married woman, brought an action in her own name to recover damages for an injury sustained by her while a passenger on the defendant's cars. The plaintiff left Rochester for Fort Plain on the evening of the 4th of November, and was injured at Fort Plain as a result of a wrongful order of the Company's brakeman, obeying which the plaintiff's clothes caught in the steps of the

car and she was thrown down, with the result that she was badly injured and permanently disabled. For this injury two separate and concurrent actions were brought: One by William T. Filer, her husband, suing alone, against the railroad company, which is reported in 49 N. Y., 42, and the husband recovered in that case for the damages sustained by the wife. The wife also brought the action first above mentioned, reported in the same volume, page 47, in her own name, and she recovered in the court below. The jury were instructed to give her, if the Company was found to have been negligent, "such an amount of damages as they thought she was entitled to for the pain and suffering consequent upon her injury, and for *any disqualification for labor* in the exercise of her natural powers." That is to say, the jury were instructed, as the Court states, that the wife "was entitled to recover consequential damages resulting from her inability to labor" (p. 55). The court of appeals held that this instruction was erroneous and reversed the judgment in favor of the wife and ordered a new trial. ALLEN, J., giving the opinion of the court, said the instruction

"was not qualified or explained, and must be held as an instruction that the plaintiff was entitled to recover consequential damages resulting from her inability to labor. That was put forth as a distinct item of damages proper to be allowed, and was not referred to as evidence of the extent of the injury and consequent pain and suffering." * * *

"There was no claim that the plaintiff was at the time of the injury, carrying on any business, trade, or labor, upon or for her sole and separate account. Her services and earnings belonged to her husband; and for loss of such services, caused by the accident, he may have an action; and another record before us shows that he has recovered for them, as he lawfully might do (Reeves' Dom. Rel., Parker's Ed., 138, and

cases cited, marg. p. 63). The laws of 1860, chap. 90, permit a married woman to carry on any trade or business or perform any labor or services on her sole and separate account, and give to her her earnings from her trade, business, labor or service; and she is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury, and for direct and immediate damages, unless she is on her own account and for her own benefit, engaged in some business in which she sustains a loss.

"The amendatory Act of 1862, chap. 172, does not enlarge the rights of the wife or detract from the rights of the husband, or take from him the right to recover for the loss of service of his wife, caused by the wrongful act of another."

"Consequential damages are in all cases limited to the amount actually sustained; and unless the wife is actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she has lost by reason of the injury, she has sustained no consequential damages; she has lost nothing pecuniarily by reason of her inability to labor. The recovery was large, and was probably affected by the instruction that the inability of the plaintiff to labor constituted one of the items of damage to be taken into account by the jury.

"For this error in the charge the judgment should be reversed and a new trial granted."

No other result was possible, unless the Court should deny that the husband, under any circumstances, could recover for the loss of the wife's services; no other result was possible, unless the defendant was to be subjected to a double liability for the same thing—one to the husband, and one to the wife.

The present case of Mrs. Humble, in its facts and in its principles, is precisely the same as in the case of Mrs. Filer. The statutes of New York and Arkansas are identical. This case of *Filer* was decided before the Arkansas statute was enacted, and unless this

court shall hold that the Filer case was not only wrongfully decided, but also that the known construction of the New York statute by the highest court of that state at the time of the re-enactment of the statute in Arkansas does not carry with it the construction put upon the New York statute by the Court of Appeals of that state,—we say unless this Court shall hold as above, the judgment of the Circuit Court of Appeals in the present case must necessarily be reversed. The doctrine of the *Filer* case has been repeatedly followed and is settled law in that State.

In the case of *Brooks vs. Schwerin, 54 N. Y., 343* (1873), action was brought to recover damages for a personal injury to the plaintiff, a married woman, caused by being knocked down and run over by the defendant's horse and wagon in a street in the city of New York on the 13th of April, 1865. The case is correctly stated in the head-note as follows:

"Plaintiff, a married woman, was run over and injured by defendant's horse and wagon. Before the injury she took charge of her family, and she also worked out by the day, earning $1.25 per day. To the proof of this fact upon the trial defendant objected on the ground that her time and services belonged to her husband. The court overruled the objection, and also refused to charge that she could not recover for her time and services while disabled. *Held* (LOTT, Ch. C., and GRAY, Ch. C., dissenting) no error; that had defendant requested a charge that she could not recover for the loss of services to her husband in the discharge of her domestic duties, the request could not properly have been refused, but the request, proceeding upon the idea that all her time and services belonged to her husband, was properly denied.

"The case of Filer v. N. Y. C. R. R. Co. (49 N. Y., 47) distinguished."

By reason of the fact that she was earning at the time of the injury $1.25 a day, the majority of the

Court held that a general charge that she was not entitled to anything was too broad, and there was no error in refusing it, but said, as appears below:

"If the defendant had requested the court to charge that the plaintiff could not recover for the loss of service to her husband in his household in the discharge of her domestic duties, the request could not properly have been refused. But the request was broader, and proceeded upon the idea that all her time and services belonged to her husband, and that she could not recover anything for the value of her time, or for the loss of any service while she was disabled. She was earning in an humble capacity ten shillings a day, and so far as she was disabled to earn this sum, the loss was hers, and the jury had the right to take it into account in estimating her damages."

The minority held not only this but went further, and held that she was not entitled to recover anything under the circumstances in this case. In giving the opinion of the court, EARL, C., said (p. 348):

"At common law when a married woman was injured in her person, she was joined with her husband in an action for the injury, and in such action nothing could be recovered for loss of service or for the expenses to which her husband had been subjected in taking care of and curing her. For such loss of service and expenses the husband alone could sue (1 Chitty Pl., 84). It is now provided by section 2 of chapter 90 of the Laws of 1860, that a married woman 'may carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor, or services shall be her sole and seperate property, and may be used or invested in her own name.' This statute effects a radical change of the common law which gave the husband the right to the labor, services, and earnings of his wife. *The services of the wife in the household in the discharge of her domestic duties still belong to the husband, and in rendering such service she still bears to him the common-law relation. So far as she is injured so as to be*

disabled to perform such service for her husband, the loss is his and not hers; and for such loss of service he and not she can recover the wrong-doer. But when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were a *feme sole,* and so far as she is disabled to perform such service by any injury to her person, she can in her own name recover a compensation against the wrong-doer for such disability as one of the consequences of the injury, under the seventh section of the same act, which provides that 'any married woman may bring and maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole,' and the money recovered shall be her sole and separate property."

The other judges, speaking through LOTT, CH. C., after referring to the above quoted provisions of the New York statute of 1860, as amended in 1862, which is identical in language with the Arkansas statute, said (p. 351):

"These provisions, while securing to a married woman compensation for personal injuries as her sole and separate property, and giving to her the right to sue for it in her own name, do not give her a right to sue for her labor and services unless 'performed on her sole and separate account;' and the earnings that are secured to her as her sole and separate property, are such as arise and result fron her labor and services performed on her sole and separate account; and it has recently been decided by the Court of Appeals that, unless the wife is actually engaged in some business or service in which she would (but for the personal injury for which she is entitled to compensation) have earned something for her separte benefit, and which she has lost by reason of the injury, she has sustained no consequential damages, having lost nothing pecuniarily by reason of her inability to labor. This is placed distinctly on the ground that the services and earnings of the wife belong to the the husband, and that he may maintain an action for them when she, at the time of the injury, was not carrying on any business, trade or labor upon or for her sole and separate

account (See H. M. Filer vs. The New York Central Railroad Co., 49 N. Y. R., 47, etc.).

" The facts disclosed in the present case do not entitle the plaintiff to a recovery for the value of the services lost while she was disabled."

The case of *Blaechinska vs. H. Mission and Home, 130 N. Y., 497* (1892), is thus stated :

" The plaintiff, a married woman, brought this action to recover from the defendant, a charitable corporation, the damages that she claims to have sustained through its alleged negligence in maintaining a broken cover over a coal-hole in the public sidewalk, which caused her to fall and break her arm. The pleadings presented the usual issue as to the negligence of each party, and the jury rendered a verdict in favor of the plaintiff for five hundred dollars."

The two first head-notes of the case state the facts sufficiently correctly :

" The provision of the act in relation to married women (Chap. 90, Laws of 1860, as amended by chap. 172, Laws of 1862), making the property a married woman ' acquires by her trade, business, labor or services, carried on or performed on her sole and separate account,' her separate property, does not apply to labor performed by her for her husband, and she cannot make a binding contract with him for her services, having no connection with a separate business and estate, although the same are to be rendered outside of her household duties. While he cannot require her to perform services for him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift, and so is not enforceable.

" In an action by a married woman to recover damages for injuries sustained through the alleged negligence of defendant the plaintiff was permitted to testify, under objection, that before the accident she did the housework and worked for her husband as a seamstress, receiving from him a weekly salary, but because of the injury was no longer able to do this work. The court charged that if plaintiff was entitled to recover she could recover for the loss of wages she had sustained.

Held, error; that plaintiff could recover actual damages only; and that the consequential damages for loss of her services, both in the house and as seamstress, could be recovered only in a separate action brought by her husband in his own name."

In giving the unanimous judgment of the Court VANN, J., cites the New York cases arising under the married woman's act as follows: *Reynolds vs. Robinson*, 64 N. Y., 589; *Coleman vs. Burr*, 93 N. Y., 17; and the case of *Filer vs. N. Y. Central R. R. Co. (supra)*, which it denominates the "leading case" upon the subject, and then sums up the law of New York in the following language:

"Applying the law, as we gather it from the statute and the manifold decisions, to the facts of this case as now laid before us, we think that the plaintiff is entitled to recover actual damages only, and that the consequential *damages for the loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. The damages for the injury to her person belong to her, but the damages for the loss of her services belong to him, because the common law gave them to him, and the statute has not taken them away.*"

We confidently claim that the rule of the New York Court of Appeals, as stated in these cases, is a correct exposition of the law and of the statutes in question, and is the law of Arkansas on the question now presented.

The effect of the New York decisions is stated by Judge COOLEY as follows (Const. Limitations, 5th ed., 64 Marg., p. 52):

"And where a particular statute or clause of the constitution has been adopted in one State from the statutes or constitution of another, after a judicial construction has been give given it in such last-mentioned State, it is but just to regard the construction as having been adopted, as well as the words; and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case."

The general rule, as pronounced by this Honorable Court is to adopt the construction of the courts of the State by whose legislature the statute was originally adopted.

Cathcart vs. Robinson, 5 Pet., 264, 280.
McDonald vs. Hovey, 110 U. S., 619.
Allen vs. St. Louis Bank, 120 U. S., 20, 34, and cases cited.
Metropolitan Rd. Co. vs. Moore, 121 U. S., 558, 572.
Logan vs. United States, 144 U. S., 263, 302.
Interstate Commerce Commission vs. Balt. & O. Rd. Co., 145 U. S., 263, 282.
Hedden vs. Robertson, 151 U. S., 520, 526.

Exceptions have been made to this general rule in cases where the courts of a State adopting a statute from another State have put a different construction upon the statute from that of the courts of the State where it originated.

Coulam vs. Doull, 133 U. S., 216, 233.
Whitney vs. Fox, 166 U. S., 637, 647.

It has been decided in Arkansas that earnings of a married woman arising from labor or services done and performed *on her sole account* become her separate property *(Sellmeyer vs. Weleh, 47 Ark., 485)*; but we fail to find any adjudication by the courts of that State that her earnings from labor, not on her own account under the statute or for her service *in the household*, are also her separate property, nor do we find any case there in which the question now presented is discussed. The Circuit Court of Appeals in this case says there are no local decisions on this point (Record, p. 48).

The exception to the general rule of this Court does not, therefore, apply to this case.

We also urge that the rule adopted by the highest court of the State of New York is the result of a true, proper and reasonable construction of these statutes; nor does it stand alone. The same conclusion has been reached in other States, as will hereafter be shown.

The verdict in this case was for the large sum of $9,000, and the record shows that the basis of this recovery was largely plaintiff's diminished earning capacity. Thus, the complaint states:

"Plaintiff alleges that said last-named injury [a rupture] is permanent, has been and always will be painful, and that she must always wear a truss or some similar appliance, and be debarred from performing many of her household duties, such as lifting, or she must submit to a surgical operation, which will be painful and dangerous.

"Plaintiff was, at the date of her injuries as aforesaid, thirty-six years of age, and her expectancy of life was thirty years; that she had been accustomed to do and had done all the household work for her family, which consisted of her husband and three children, and her working capacity was of the value of twenty-five dollars per month; but since said injury she has been able to perform only light work, and that the value of her working capacity has been reduced one-half" (Tr., p. 3).

There was no claim that the plaintiff, at the time of the accident, was engaged in any work or labor for her own behalf. The contrary was distinctly shown. This ground of liability was distinctly avowed by the plaintiff's counsel on the trial of the case, and evidence was offered, over the defendant's objection and exception, "solely for the purpose of showing capacity of the plaintiff to earn money" (Tr., p. 12). On the trial, against the defendant's objection, evidence of the plaintiff and of the medical witnesses was offered to show that her injury was permanent, to show her age

to be, as alleged, thirty-six years (and thus prove her expectancy of life to be thirty years, as alleged in the complaint, Record, p. 3), and her diminished capacity to earn money. Indeed, the evidence to show this diminished capacity of the wife to earn money constituted the whole bulk of the testimony. This was received against the defendant's objection, the record stating (p. 32) :

" The defendant objects to all evidence going to show the plaintiff's capacity to labor was diminished by the injury, and the court overruled the objection, and the defendant then excepted."

The court refused several charges requested on behalf of the defendant, that the plaintiff could not recover anything for diminished earning capacity, she not being engaged in any separate business on her own account. Thus, among other requests, the defendant asked the court to charge as follows :

" Plaintiff cannot recover anything on account of her diminished capacity to labor.

Because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession or occupation.

" And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery " (Tr., pp. 33, 34, Charge No. 7).

This was refused and the defendant excepted (Tr., p. 34).

The contrary of these requests in this respect was charged by the court, as follows :

" If you should find for the plaintiff, in assessing her damages you will take into consideration her age *and earning capacity* before and after the injury was received," etc. (Tr., p. 35).

This charge was duly excepted to (Tr., p. 35).

It is, therefore, incontestable that the recovery embraced not only damages for physical injury of the plaintiff, but also *for her diminished earning capacity* by reason of a permanent injury extending throughout her life.

The Circuit Court of Appeals, in its opinion (Tr., p. 45), made no reference to the character of the damages to be recovered by a married woman, but held that under the Arkansas statute providing that she "may maintain an action in her own name * * * for any injury to her person," she may recover all damages resulting from such an injury.

On the other hand, SANBORN, J., in his dissenting opinion, says (Tr., p. 49) that under the statutes of Arkansas "the logical result seems to me to be that the husband may, and the wife cannot, recover for the loss of the wife's services or for the diminished capacity to labor, which is the same thing," citing *St. Louis, Iron M. and S. Ry. vs. Henson, 58 Fed. Rep., 531;* s. c. *19 C. C. A., 169*, where the same Circuit Court of Appeals held that the statutes of Arkansas relating to married women, providing that their earnings shall be their sole and separate property, does not divest a husband of the right to his wife's services, nor where her death has been caused by negligence, preclude him from recovering for the loss of such services.

We ask special attention to the case of *Henson*, last above cited, which was decided by the Circuit Court of Appeals of the 8th Circuit, CALDWELL, SANBORN and THAYER, JJ., October, 1893.

This decision is in direct conflict with the decision in the case now at bar. In *Henson's* case, the action was brought by the husband, in the Circuit Court of the United States for the Eastern District of Arkan-

sas, against the railway company, to recover damages for the alleged negligent killing of his wife by the railway company. She was traveling in a boarding car attached to one of its trains. There was a trial by a jury, and a verdict and judgment for the husband. Note that he brought the action for the death of his wife through the negligence of the railway company. The statute of Arkansas giving a right to recover for an injury resulting in death was as follows:

"SECTION 5908. For wrongs done to the person or property of another, an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer."

By the act of March 6, 1863, Section 5912, it is likewise provided that

"Every such action shall be brought by and in the name of the personal representative of such deceased person, and if there be no personal representative, then the same may be brought by the heirs at law of such deceased person."

On February 3, 1875, the legislature passed an act as follows:

"SECTION 5910. When any adult person be killed by railroad trains running in this state, the husband may sue for damages to a wife. If the adult be wounded, he may sue in his own name."

In the case of *Henson*, as appears in the note to Sandels & Hill's Digest of the Statutes of Arkansas (p. 1310), it is stated:

"This portion of section 3, act of February 3, 1875 [Section 5910], was not carried into the last Digest, and as there is no express repeal of it, nor repeal by necessary implication, in the opinion of the Digestor, it is inserted. The question as to whether it is re-

pealed is fully and ably argued in the briefs of counsel in case of *St. L. S. W. Ry. vs. Henson*, in U. S. Circuit Court of Appeals for this circuit, reported in 58 Fed., but the case was determined upon another issue, leaving this important question undecided."

The Circuit Court of Appeals held, in that case, that aside from the said act of February 3, 1875, and notwithstanding the provisions of Sections 5908 and 5912, which, in express terms, give the right of action to the personal representatives or heirs, and not the husband, and notwithstanding the Married Women's Act, giving the wife the right to carry on any trade or business, and perform any labor or service on her sole and separate account, and that the earnings of a married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested in her name, the husband may recover in such case for the loss of the services of the wife caused by her death.

CALDWELL, J., says (p. 533):

"The contention of the plaintiff in error is that, under this [married women's] act, the husband has no valuable right in the services of his wife, and that he suffers no pecuniary loss by her death. This act does not put the wife on the footing of a concubine to her husband. It does not relieve her from those marital duties and obligations she takes upon herself at the marriage altar, and which are inherent in the relation of husband and wife among all Christian peoples."

The Court in *Henson's* case affirmed the judgment of the Court below, giving the husband a right to recover for the loss of the services of the wife caused by her death, the Court below having stated to the jury, "You are to say in dollars and cents what the value of her services should

be." In short, that case decides that the earning capacity or value of the services of the wife belong to the husband, except such as are made hers by the Married Women's Act (where she is engaged in labor or services on her own account, or for others); and Judge SANBORN is, therefore, right in the position taken in his dissenting opinion in this case (Tr., p. 49), that the decision in the *Henson* case is in direct conflict with the decision of the Circuit Court of Appeals in the case now at bar.

It is generally held by the State Courts that damages resulting in the loss or impairment of the wife's services belong to the husband.

AUTHORITIES IN OTHER STATES.

In Texas, where the statute provides that all property acquired by a husband or wife during the marriage shall be community property, except any acquired by gift, devise or descent, the Supreme Court of that state has decided that damages recovered for injury to the wife is community property and must be sued for and recovered by the husband, and that the right to sue for such damages is a *chose in action* and is property in the legal sense.

Ezell vs. Dodson, 60 Tex., 331, citing 2 Bishop on Married Women, Sec. 271, and *Chicago, B. & Q. R. R. vs. Dunn, 52 Ills., 260.*

Same general doctrine in other states, see

Hawkins vs. Front St. Ry., 3 Wash. St., 592.
Redfield vs. Oakland St. Ry., 112 Cal., 220.
Union St. Ry. vs. Stone, 54 Kans., 83, 100.
Henry vs. Klopfer, 147 Penn., 178.
Scott vs. Metropolitan Ry., 4 McKay, 152.
2 Rorer on Railroads, p, 1094.

Reeve Domestic Relations, 4th Ed., pp. 87, 89, and note:

"But it may be remarked here that general statutes empowering a married woman to perform labor and services on her own account do not necessarily, in the absence of express provisions to that effect, abrogate the common-law rule on this subject. It is conceived that the husband's common-law right to her earnings would remain unaffected unless it can be shown that the services were rendered under an understanding the she should receive the pay therefor or at least under circumstances showing her intention to take advantage of the statutory privilege of performing such services on her sole and separate account and an election on her part to exclude her husband from the benefit thereof." "But as a general rule, at least, it is clear that the wife's right to sue alone in such case does not affect the husband's right to sue alone for his consequential damages arising from the loss of his wife's services, *consortium*, or for expenses incurred and the like. And in the absence of a statute, and except where the wife is carrying on a separate business or trade, or working on her sole and separate account, it is manifestly error to include in the wife's claim for damages a claim for her loss of time or expenses incurred." Citing.

Birkbeck vs. Acknoyd, 74 N. Y., 356.
Sheo vs. Maloney, 52 Conn., 327.
Hoyt vs. White, 46 N. H., 45.
Haggelleaker vs. Goodfellow, 64 Ill., 238.
McCoy vs. Hyatt, 80 Mo., 130.
Tuttle vs. R. R., 42 Iowa, 518.

The case of *Harmon vs. Old Colony R. R. Co., 165 Mass., 100,* which was relied upon by counsel for defendant in error to support their contention that the impairment of a married woman's capacity to perform labor may be considered as an element of damages in an action by her for personal injury, is not only not applicable to the case at bar, but inferentially tends to support the claim of plaintiff in error. In the Harmon case the plaintiff was *engaged in business on her own account,* keeping a restaurant, and she

alleged as damage that she "is not able to attend to the same now and is incapacitated from doing so in the future, and has thereby suffered great loss and damage in her business;" she asked no damages for lessened ability to labor generally or to perform her household duties. In the case now presented there is no allegation nor proof that plaintiff was engaged in any business or occupation on her own account, and she claims damages only on the ground that her capacity to perform her household duties is impaired. Under these circumstances the remarks of the court, in the *Harmon case* must be read as referring only to damages caused by the plaintiff's incapacity to attend to her own private business, and not to labor generally or perform the services due her family in the household. The decision is not inconsistent with the New York rule. We respectfully submit that the rule announced in the New York cases is just and equitable, preserving to the husband the rights which have always been vested in him, and to the wife the rights secured to her by the legislation, which to the prescribed extent and only to such extent has emancipated her from the rules of the common law.

III.

Under the circumstances of this case plaintiff's husband should have been made a party, in order to secure justice to all parties in interest and to prevent the subjection of the Railway Company to another action by him for the same damages.

It is evident from what has already been presented that a right of action for the damages claimed in this case, for loss of service, is vested in the husband of plaintiff. It follows that the defendant company should have been protected by the trial court from the possibility and probability of another recovery by him on the same cause of action and on the same proof. The court refused to perform this act of justice by overruling defendant's motion that the husband be joined with his wife as plaintiff (Tr., pp. 9 and 52).

The remarks of the Circuit Court of Appeals in its opinion (Tr., p. 45) do not apply to this point because the Court assumed that the Arkansas statutes authorized a married woman to sue for *all* damages for personal injuries of whatever nature in a separate action. That this is not a proper construction of the statute we believe we have established.

We also contend that the husband should have been made a party plaintiff because he was domiciled in Louisiana, which state was also the domicil of his wife (*Anderson vs. Watt*, 138 U. S., 694, 706, and cases cited), and in which State compensation for injury to a married woman belongs to her husband and suit therefor must be brought in his name.

Ford vs. Brooke, 35 La. Ann., 157.
White and husband vs. Railway, 42 La. Ann., 990.

This case presents the anomaly of a wife domiciled in Louisiana suing in Arkansas for damages which under the laws of the domicil belong to her husband, and for which he may recover in an action in that State by himself alone. The motion of

the railway company to have him made a party in this action was eminently proper and should have been granted. If it had been granted there could be no objection of non-joiner; the expense and delay of another suit would have been avoided; the rights of no one would have been jeopardized, and the defendant would have been saved from the danger of being subjected to two recoveries for the same cause of action.

No reason was shown why the husband should not have been made a party plaintiff nor that it was impracticable to enforce the order applied for.

In *Morning Journal Association vs. Smith, 55 Fed. Rep., 141* (1893), cited by counsel for plaintiff at the hearing below there was a demurrer interposed to an action for libel by a married woman, a subject of Great Britain, and it was held that, under Section 450 of the New York Code of Civil Procedure (Laws of 1890, Ch. 248), she could maintain the action without joining her husband. This decision was the only one the court could have rendered under the law, which provides not only that the husband is not a necessary but is *not a proper party* in such an action; and, also, that *all* the recovery shall be the separate property of the wife.

The Section (450 N. Y. Code Civ. Pro.), so far as it is necessary to quote it here, is as follows:

"In an action or special proceeding, a married woman appears, prosecutes and defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of

his wife, and all sums that may be recovered in such actions or special proceedings shall be the separate property of his wife." * * *

The judgment of the Circuit Court of Appeals should be reversed.

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